IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

[redacted] 79-5506

CURTIS BRINTLEY,

Appellant,

-vs-

STATE OF MICHIGAN,

Appellee.

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SUPREME COURT, U.S.

IN THE MATTER OF PEOPLE OF THE STATE OF MICHIGAN v ANNETTE GAIL ALEXANDER, Appellant, (In re Wayne County Prosecutor v Recorder's Court Judge)

JURISDICTIONAL STATEMENT

AND APPENDIX

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Curtis Brintley and Annette Alexander, Appellants herein, appeal from the final judgment of the Supreme Court of Michigan, dated June 25, 1979 (rehearing denied July 18, 1979), reversing decisions of the Michigan Court of Appeals in each of their cases. Appellants submit this jurisdictional statement to show that this Court has jurisdiction of the appeal and that the appeal presents a substantial federal issue warranting plenary consideration.

OPINIONS BELOW

The opinion of the Supreme Court of Michigan in both cases, which were consolidated for argument in that court, is reported at 406 Mich 374, 280 NW2d 793 (1979). The opinions of the Michigan Court of Appeals are reported at 85 Mich App 714, 272 NW2d 532 (1978) (Brintley), and at 85 Mich App 727, 272 NW2d 587 (1978) (Alexander). Copies of these opinions appear in the Appendix, pp. 8-43. The decisions of the trial courts, in both instances the Recorder's Court of the City of Detroit, are unreported.

JURISDICTION

The judgment of the Supreme Court of Michigan, rendered on June 25, 1979, in each case upheld the validity of convictions and sentences under Mich Comp Laws [hereinafter MCLA] §750.227b (Supp 1979-80) in the face of an attack that the statute as applied in each case was repugnant to the Fifth and Fourteenth Amendments of the United States Constitution.

The statute in question, which can be found in West's Mich Comp Laws Ann, vol 38, supp 1979-80, p. 198, provides:

> Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 [carrying concealed weapons] or section 227a [unlawful possession of firearm], is guilty of a felony, and shall be

imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term imposed pursuant to subsection (1).

A timely application for rehearing was filed on July 11, 1979, and denied on July 18, 1979. This denial order appears in the Appendix, p. 43.

A notice of appeal to this Court was timely filed in the Supreme Court of Michigan on September 17, 1979. This appeal is being docketed in this Court within ninety days from the denial of rehearing below. United States v Healy, 376 US 75, 77-80 (1964).

Title 28 USC §1257(2) (1970) confers on the Court jurisdiction for this appeal. The following cases sustain the jurisdiction of this Court. Benton v Maryland, 395 US 784 (1969); North Carolina v Pearce, 395 US 711 (1969); Blockburger v United States, 284 US 299 (1932).

QUESTION PRESENTED

DOES THE DOUBLE JEOPARDY CLAUSE, APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, PROHIBIT SEPARATE CONVICTION AND SENTENCE FOR VIOLATION OF MCLA 750.227b (POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY) AND FOR THE UNDERLYING FELONY (ARMED ROBBERY IN BRINTLEY AND SECOND DEGREE MURDER IN ALEXANDER), WHERE, IN BOTH INSTANCES, ALL THE PROOFS REQUIRED TO ESTABLISH A VIOLATION OF THE UNDERLYING FELONY ARE NECESSARILY REQUIRED FOR PROOF OF VIOLATION OF §750.227b, WHERE THERE IS NO EVIDENCE THAT THE WEAPON HAS BEEN POSSESSED AT A TIME OR PLACE OR FOR ANY OTHER PURPOSE THAN COMMISSION OF THE UNDERLYING FELONY, WHERE THE UNDERLYING FELONY IS SPECIFICALLY CHARGED AS THE FELONY ELEMENT OF THE POSSESSION OF A FIREARM CHARGE AND WHERE (IN BRINTLEY) THE STATE HAS ALREADY AUGMENTED PUNISHMENT FOR ARMED ROBBERIES ABOVE THE PUNISHMENT IMPOSED FOR UNARMED ROBBERIES.

STATEMENT OF THE CASE

On March 18, 1977, Curtis Brinley committed a robbery while in possession of a handgun. At the ensuing non-jury trial, Count I of a two count information alleged that Mr. Brintley

> did assault the above-named Complainant while armed with a dangerous weapon or an article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, to-wit: handgun and did then and there feloniously rob, steal and take from the person of said Complainant, or in his presence, lawful United States Currency, handbag and contents and sundries, also money order and one (1) silver certificate, contrary to Sec. 750.529, MCLA.

Count II alleged that he

> did then and there carry or have possession of a firearm, to-wit: a handgun in the commission or attempt to commit a felony to-wit: Robbery Armed, contrary to MCLA 750.227b.

The trial judge, Honorable Robert L. Evans, first found Mr. Brintley guilty of armed robbery and then found "as a fact, that the instrumentality used in the robbery armed was a gun and that the defendant, Curtis Brintley, possessed the gun during the commission of a felony which is in violation of statute 750.227b." Trial Record, vol. III, 15-16. Mr. Brintley was sentenced to five to ten years for the armed robbery and an additional two years for the felony-firearm offense, the latter sentence to run consecutive to the former.

On appeal to the Michigan Court of Appeals, Mr. Brintley argued that §750.227b violated both the Federal and State [Mich

Const 1963, art 1, §15] Double Jeopardy Clauses. Finding that both the Federal and State Constitutions barred separate conviction and sentence for both a greater and lesser included offense, and that armed robbery was a lesser included offense to the §750.227b charge in this case, that court vacated Mr. Brintley's §750.227b conviction. 85 Mich App at 720-721, 272 NW2d at 585.

On March 17, 1977, Annette Alexander killed her lover during a domestic argument within their shared home. The subsequent Information charged in two counts that Ms. Alexander

> [Count I]
> wilfully, feloniously, maliciously and with a design to effect the death of one LOSLORAN MORRIS WHITLOW did kill and murder the said person with a shotgun, said act not being justifiable or excusable but being without premeditation or deliberation ...

Count II charged that at the same time and place, Ms. Alexander

> did then and there carry or have possession of a firearm, to-wit: shotgun in the commission or attempt to commit a felony to-wit: Murder Second Degree...

The evidence presented at trial established that the shotgun referred to in Count I was the same weapon referred to in Count II and that the second-degree murder referred to in Count II was the same second-degree murder alleged in Count I. There was no evidence offered of possession of the shotgun or any other weapon by Ms. Alexander at a time or place separate from the time and place of the alleged murder, nor was there any evidence of possession of the shotgun or any other weapon by Ms. Alexander for the commission of any offense other than the alleged murder.

As to Count II, Judge Evans, the same judge who had presided at Mr. Brintley's trial, instructed the jury

> Now it should be quite clear to you that the defendant's guilt or innocence of the second Count will depend on whether or not she's convicted of any Count charged in the first offense, guilty of any offense in the first Count.

> I told you that the second degree and manslaughter were both felonies and that if you find that the defendant is guilty under Count I of either second degree murder or manslaughter and if you further find that the murder or manslaughter was committed at a time when she carried or possessed a firearm then that would be sufficient for Count II, for a verdict of guilty under Count II. Trial Record, vol. IV, 55-56.

Apparently rejecting Ms. Alexander's defenses of accident and self-defense, the jury convicted her as charged on both counts.

At the time of sentencing, Judge Evans sua sponte raised the constitutional issue of separate sentencing on the §750.227b count. Trial Record, sentencing vol., 4. After a brief discussion of decisions from other jurisdictions, Judge Evans declined to sentence separately under §750.227b and merged its mandatory two year sentence with the two and one-half to ten years imposed under the murder conviction. See Appendix, pp. 4-7.

The prosecution then sought an order of superintending control in the Michigan Court of Appeals to compel imposition of the mandatory sentence required by §750.227b. Ms. Alexander's Brief in Opposition to Order of Superintending Control raised both the Federal and State Double Jeopardy Clauses as grounds for denying the order. The appellate court found that the federal provision was an independent bar to separate conviction and sentence for second degree murder and violation of §750.227b. 85 Mich App at 737-739, 272 NW2d at 593.

The Supreme Court of Michigan, sua sponte, granted leave to appeal, 403 Mich 832-833 (1978), and issued its four-to-three decision on June 25, 1979. Part I of the opinion found a clear intent of the Michigan legislature that §750.227b create a separate offense. 406 Mich at 398-391, 280 NW2d at 795-796. Part II held that the Federal Double Jeopardy Clause did not substantively limit the creation of separate offenses to be imposed at a single

trial, Id., at 391-394, 280 NW2d at 796-798, and that at any rate the conviction under §750.227b as to both Mr. Brintley and Ms. Alexander, under the prevailing federal test, was not the same offense as the underlying felony. Id., at 394-398, 280 NW2d at 798-799. Part III held that the state constitution did not bar the separate convictions. Id., at 399-402, 280 NWd at 800-801. The convictions were, therefore, reimposed, and Ms. Alexander's case was remanded for sentencing. There were two dissenting opinions among the three dissenting justices, each of which found that the Federal Double Jeopardy Clause barred the conviction and sentence under §750.227b.

THE BASIS FOR JURISDICTION

In the present case the Supreme Court of Michigan necessarily interpreted the Federal Double Jeopardy Clause when it upheld the validity of Appellants' convictions under §750.227b. It was compelled to do so because Appellants had placed this very issue before the lower courts, which in part found the statute invalid on federal grounds; and because in Part III of its own opinion the Michigan Supreme Court found that the State Double Jeopardy Clause, Mich Const 1963, art 1, §15, did not bar the convictions. Thus, it was essential to the state supreme court's analysis and holding that the state statute was not repugnant to the Federal Constitution.

Specifically, the court cited Brown v Ohio, 432 US 161 (1977), for the proposition that the Federal Double Jeopardy Clause does not substantively limit the legislative branch, 406 Mich at 391, 280 NW2d at 796, and that at a single trial a court may impose whatever punishment is authorized by the legislature. Id., at 392, 280 NW2d at 797. The court went on to question whether the test articulated by this Court in Blockburger v United States, 284 US 299 (1932), was constitutional or merely a matter of statutory construction. Id., 406 Mich at 395, 280 NW2d at 798.

The court found, arguendo, that the test was satisfied in the instant cases because the felony-firearm statute, §750.227b, required proof of any felony rather than a specific offense for which either Appellant had been convicted. These findings, based on federal constitutional law, reveal that the court upheld the validity of the state statute, §750.227b, in the face of a meritorious constitutional attack and that jurisdiction to hear this appeal reposes in 28 USC §1257(2).

Should this appeal be deemed improvidently taken, Appellants request that this jurisdictional statement be treated as a petition for a writ of certiorari pursuant to 28 USC §2103.

THE ISSUES ARE SUBSTANTIAL

This appeal is based on US Const, Amend V, applicable to the State of Michigan through US Const, Amend XIV, Benton v Maryland, 395 US 784 (1969), which provides in pertinent part:

> nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

This fundamental safeguard, designed "to protect the liberties of the defendant," Mayers and Yarbrough, Bix Vexari: New Trials and Successive Prosecutions, 74 Harv L Rev 1, 4 (1960) citing 1 Annals of Cong (1789-1791) [1789-1824] at 753, "has descended from days when sanguinary punishments were frequent." Stevens, Sources of the Constitution of the United States (1894) at 230. It stands as a bar against both multiple punishment and multiple prosecution. Cf., e.g., Ex Parte Lange, 85 US (18 Wall) 163 (1874); North Carolina v Pearce, supra.

Because of common law rules against joinder, double punishment originally could result only from multiple trials, and the historical development of the provision has consequently tended to focus much more heavily on the multiple prosecution aspect of the guarantee. As noted, however, in Ex Parte Lange, 85 US at 172:

> [m]anifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution.

With the increased incidence today of multi-count prosecutions, and "the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes ... [coupled with] our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution..." Ashe v Swenson, 397 US 436, 452 (1970), (Brennan, J., concurring) protection of the multiple punishment aspect of the guarantee has assumed increasingly greater significance. Cf. Note, Double Jeopardy and the Multiple-Count Indictment, 57 Yale L J 132, 134 (1947). See also Sigler, A History of Double Jeopardy, 7 Am J Legal Hist 283, 289 (1963).

Double jeopardy guarantees today are enforced for the most part by the test formulated in Blockburger, 284 US at 304:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

This rule has been applied in various contexts: single trials (Blockburger); multiple trials (Brown); and multiple offenses arising from one transaction (Gore v United States, 357 US 386 (1958)). The opinion of the Michigan Supreme Court in the instant cases raises substantial questions regarding the scope and content of the Double Jeopardy Clause and the continuing validity of the concomitant Blockburger rule.

I. THE DOUBLE JEOPARDY CLAUSE IS A SUBSTANTIVE LIMITATION ON THE MICHIGAN LEGISLATURE.

The finding of the Michigan Supreme Court that this fundamental protection does not substantively limit the legislature

is an unprecendented and unwarranted abdication of its constitutional responsibility. It is the special function of the judiciary to ensure that no branch of government exceed the parameters of its authority as defined by the Constitution. United States v Nixon, 418 US 683 (1974); Powell v McCormack, 395 US 486, 549 (1969); United States v Carolene Products Co, 304 US 144, 152 (1938).

As Chief Justice Marshall proclaimed in Marbury v Madison, 5 US (1 Cranch) 137, 177, 178 (1803):

> It is emphatically the province and duty of the judicial department to say what the law is.
>
> Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes to the constitution, and see only the law.
>
> This doctrine would subvert the very foundation of all written constitutions.

In Jeffers v United States, 432 US 137 (1977), this Court emphasized that the Double Jeopardy Clause in fact limits legislative authority, rejecting the lower court's conclusion that greater and lesser offenses could be separately punished if Congress clearly so intended:

> The critical inquiry is whether Congress intended to punish each statutory violation separately. [citations omitted] In Ianelli v United States, the Court concluded that Congress did intend to punish violations of §1955 separately from §371 conspiracy violations. Since the two offenses were different, there was no need to go further. [citation omitted] If some possibility exists that the two statutory offenses are the "same offense" for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties. Jeffers, 432 US at 155 (emphasis added)

On close examination of the statutes involved, the Court concluded that Congress had not authorized separate punishment, and there was no need to determine if they were different for double jeopardy purposes.

A similar analysis is found in Simpson v United States, 435 US 6 (1978), where petitioners were convicted in a single trial of aggravated bank robbery, 18 USC §§2113(a) & (d), and using firearms to commit the robbery, 18 USC §924(c). This Court agreed with the lower court that §924(c) was intended to create a separate offense from the underlying felony but that

> this is the beginning and not the end of the analysis necessary to answer the question presented for decision. In Blockburger v United States [citation omitted] this Court set out the test for determining "whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment." Brown v Ohio, [citation omitted]. Simpson, 435 US at 10-11.

The Blockburger test was not reached, however, because

> [b]efore an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary, following our practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged. Id., at 11-12.

Although the test was again avoided, Simpson clearly reveals that legislative penology, even in a single trial, must prove to be "constitutionally permissible" as defined by Blockburger.

Jeffers and Simpson directly rebut the proposition of the Michigan court that there is no basis for constitutional inquiry when a court finds a legislative intent to create separate offenses. In fact, such a finding is precisely what mandates a constitutional analysis.

The state court's reliance on the observation in Brown, 432 US at 165, that the constitutional guarantee is limited in a single trial to assuring the legislative "authorization" is not exceeded, is also misplaced. Because no criminal statute is self-executing, multiple punishment can only result from the acts of a prosecutor and court. Moreover, because a judicial finding

of a legislative intent to cumulate punishment is a prerequisite to imposition of multiple punishment, it is clear but not significant that the "double jeopardy guarantee serves principally as a restraint on courts and prosecutors." Id., (emphasis added). Additionally, because the Ohio Court of Appeals had defined the joy-riding offense there involved as a lesser included offense of auto theft, which conclusion this Court accepted, the case did not present a question of limitation of legislative power.

II. THE VIOLATION OF §750.227b ALLEGED IN COUNT II OF EACH INFORMATION REQUIRED PROOF OF ALL ELEMENTS CONTAINED IN COUNT I, AND THUS THE OFFENSES WERE THE SAME FOR DOUBLE JEOPARDY PURPOSES.

An inquiry into whether two offenses are the same for double jeopardy purposes must look to the indictment or information brought against the defendant. As stated in Rex v Vandercomb and Abbott, 2 Leach 708, 720, 168 Eng Rep 455, 461 (Crown 1796), there is a double jeopardy bar if "the first indictment were such as the prisoner might have been convicted upon proof of the facts in the second indictment..." Accord, State v Hill, 26 Ariz App 37, 545 P2d 999 (1976); State v Anonymous, 31 Conn Supp 292, 329 A2d 136 (1974); State v Carroll, 189 So2d 273 (Fla Dist Ct App 1966); Kuklis v Commonwealth, 361 Mass 302, 280 NE2d 155 (1972); State v Ballard, 280 NC 479, 186 SE2d 372 (1972).

This approach does not necessitate the abandonment of the statutory inquiry of Blockburger, but it does require an analysis of the statute as embodied in the charge brought against the defendant. Applied in this manner, the Blockburger test affords an actual defendant the full guarantee of the Double Jeopardy Clause while still giving sufficient latitude to legislative penology.

In the present case, Count I in Brintley charged armed

robbery and specified a pistol as the dangerous weapon; Count II alleged a violation of §750.227b and specified armed robbery as the felony and a pistol as the firearm. In Alexander, Count I alleged commission of second-degree murder specifying a shotgun as the murder weapon, and Count II alleged violation of §750.227b specifying second-degree murder as the felony and a shotgun as the firearm. See Appendix, pp. 2-3. The proofs required to sustain a conviction under Count II, in both cases, would necessarily sustain a conviction under Count I, for there was no statutory provision required to prove Count I not also required to prove Count II.

III. CONVICTION UNDER §750.227b REQUIRES PROOF OF A SPECIFIC FELONY.

The narrow holding of the opinion below was that the required proofs of §750.227b and of the defendants' underlying felonies each contained an element that the other did not. The court reasoned that the prosecution was not legally required to prove the specific underlying felony to achieve a conviction under §750.227b, that is, that the state only need prove possession of a firearm plus any felony. The court found no double jeopardy issue because none of the elements of either a murder or armed robbery conviction were necessarily required to prove this threoretical felony.

In Brown, this Court held that greater and lesser included offenses are the "same" for double jeopardy purposes. The Ohio Court of Appeals in that case had defined joy-riding as taking a vehicle without the owner's consent and auto theft as joy-riding with the intent permanently to deprive the true owner of possession. This Court found that because the former did not require proof of any fact not already required by the latter, it was, therefore, a lesser included offense and by definition such offenses are the "same" under Blockburger.

Section 750.227b is also, by definition, a greater offense of the underlying felony. Section 750.227b requires proof of (1) knowing (2) carrying or possession of (3) a firearm (4) during the commission or attempted commission of (5) a felony. The first four elements are constant. The last element, however, is variable, dependent in each case on the underlying felony charged. Where the underlying felony is armed robbery, as in Brintley, the last element is armed robbery; where it is murder, as in Alexander, the last element is murder. In all cases, however, §750.227b requires proof of some one felony as is reflected in the Informations in both Brintley and Alexander and in the jury instructions in Alexander. In each case conviction of the underlying felony was essential to reaching the question of violation of §750.227b. Inasmuch as the respective armed robbery and murder served as elements of the allegations under §750.227b, and establishing the underlying felonies did not require proof of anything not also required for proof of violation of §750.227b, they were lesser included offenses of §750.227b.

The argument that the last element of §750.227b merely requires proof of any felony is unsupportable. No law operates in a vacuum, without reference to the actual defendant or his or her alleged criminal activity. It is for that reason that a specific felony is necessarily enumerated in every felony-firearm Information. Such was the case in both Appellants' cases, and failure to identify a particular felony would have created insurmountable notice problems. The idea that violation of a law analogous to §750.227b can be shown with proof of any felony was appropriately criticized in dissent in State v Treadway, 558 SW2d 651, 654 (1977):

> No additional fact is here required for his conviction of armed criminal action other than that which was proved as an essential element of his conviction for robbery in the first degree. However we may theoretically construct and construe

> these statutes so as to recognize that they might be constitutionally secure, this defendant under these facts in this case is being punished twice for the same offense, namely robbery. His rights should not depend upon a conceivable construction of two statutes, his conviction under one of which was wholly and completely dependent upon his conviction under the other. (emphasis in original)

Harris v Oklahoma, 433 US 682 (1977), is also instructive on this issue. Defendant therein had been convicted of felony murder and then subsequently charged with the underlying robbery with firearms. The second prosecution was held barred by the Double Jeopardy Clause because conviction of the greater crime was necessarily dependent on conviction of the lesser crime. Because the offenses were the "same," they could not be charged separately. Similarly, in each of the present cases, conviction under §750.227b was also necessarily dependent on conviction of the underlying felony. They were, therefore, the same for double jeopardy purposes.

While the Blockburger test looks to the law and not to the proofs, as a constitutional test designed to assure protection of individual liberties, it must look to the law as it functions in a specific trial with an actual defendant. The dangers to our system of law from a narrow reading of the ban against multiple punishment have also been recognized by the courts of many other states. Considering the application of identical or related statutory provisions, courts in Alaska, Indiana, Florida, Georgia, Illinois, Missouri and Tennessee have, on various grounds, refused to uphold cumulative punishment in situations analogous to those at bar. Whitton v State, 479 P2d 302 (Alaska 1970); Williams v State, 226 Ind 668, 366 NE2d 642 (1977); Rusnak v State, 336 So2d 1226 (Fla App 1976); Roberts v State, 228 Ga 298, 185 SE2d 385 (1971); People v Carter, 443 SW2d 176 (Mo 1969); Key v State, 563 SW2d 184 (Tenn 1978); Cole v State, 539 SW2d 46 (Tenn Ct of Crim App 1976).

IV. MR. BRINTLEY'S SENTENCE HAS BEEN TWICE AUGMENTED UNDER TWO STATUTES WHICH ARE THE SAME FOR DOUBLE JEOPARDY PURPOSES.

Mr. Brintley's conviction under §750.227b and MCLA §750.529 (published in West's Mich Comp Laws Ann, vol. 39, p. 404 (1968)) (armed robbery) presents a distinct issue, for two separate sentence enhancements cannot each be imposed if the provision which distinguishes the one enhancement statute from the underlying offense is the "same" as the provision which distinguishes the other from the lesser offense.

Section 750.529 provides in pertinent part

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

This is a sentence enhancement statute to MCLA §750.530 (published in West's Mich Comp Laws Ann, vol. 39, p. 414 (1968)) (unarmed robbery), which provides

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

Section 750.529 contains no provision not also within §750.530 except possession of a dangerous weapon or any article fashioned as such. Thus, the Michigan legislature has expressly provided for an increased punishment for robbery committed with a firearm. The only provision of §750.227b which distinguishes it from either §750.529 or §750.530 is possession of a firearm. Proof of this one element also results in an increased punishment. These sepa-

rate punishments resulting from possession of a firearm and possession of a dangerous weapon or article so fashioned are the "same," for every proof of a firearm under §750.227b will invariably prove possession of a dangerous weapon under §750.529. The Double Jeopardy Clause forbids the state from twice increasing Mr. Brintley's sentence for the same offense and requires that his sentencing be either under §750.227b and §750.530 or under §750.529 alone.

V. THE DOUBLE JEOPARDY CLAUSE BARS MULTIPLE CONVICTIONS ARISING FROM A SINGLE ACT OCCURRING AT ONE PLACE, AT ONE TIME, AND FOR ONE PURPOSE.

Previously useful in protecting the prosecution from the harshness of common law rules requiring dismissal for variance between pleadings and proof, cf. Note, The Federal Bank Robbery Act - The Problem of Separately Punishable Offenses, 18 Wm & Mary L Rev 101, 105 (1976), the Blockburger test has become an historical anomaly widely criticized in the legal literature. Cf. Note, 18 Wm & Mary L Rev, supra; Note, The Same Offense in Oklahoma - Now You See It, Now You Don't, 28 Okla L Rev 131 (1975); Comment, Double Jeopardy: A Protection or An Empty Promise?, 25 U Fla L Rev 838 (1973); Comment, Double Jeopardy: Should "Offense" Be Defined in Terms of Substantive Law?, 38 Mo L Rev 528 (1973); Note: Double Jeopardy and the Multiple-Count Indictment, 57 Yale L J 132 (1947).

As Justice Brennan stressed in his widely cited concurring opinion in Ashe v Swenson, supra, the Blockburger test

> ...does not enforce but virtually annuls the constitutional guarantee. ...Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the "same evidence" test are simply intolerable. Id., at 451-452.

Cf. also Brown, 432 US at 166, n. 6.

Applying Justice Brennan's reasoning, many jurisdictions have applied a less rigid test to resolve double jeopardy issues, even at a single trial. State v Allen, 292 A2d 167 (Me 1972), for example, held that a defendant could not be separately convicted at a single trial for possession and for sale of heroin when the possession and sale were inextricably part of a single transaction:

> Where the only possession of the narcotic drug is that incident to and necessary for the sale thereof, and it does not appear that there was possession before or after and apart from the sale, the State cannot fragment the accused's involvement into separate and distinct acts or transactions to obtain multiple convictions... Id., at 172.

Accord: Thompson v State, 259 Ind 587, 290 NE2d 724 (1972); Fairman v State, 83 Nev 137, 429 P2d 342 (1967); People v Roberts, 40 Cal2d 483, 254 P2d 501 (1953).

The test that emerges from these decisions is equivalent to the "divisible transaction" standard articulated by the Supreme Court of California in Neal v State, 55 Cal2d 11, 9 Cal Rptr 607, 357 P2d 839 (1960). Applying section 654 of their Penal Code, which statute implements the protection against multiple punishment and provides that

> An act or omission which is made punishable in different ways by different provisions of this code may be punishable under either of such provisions, but in no case can it be punished under more than one,

the court observed that "few if any crimes, however, are the result of a single physical act." Thus, "'where a course of conduct violated more than one statute...the problem was whether it comprised a divisible transaction which could be punished under more than one statute under the meaning of section 654.'" 9 Cal Rptr at 611.

The answer to the question was formulated as follows:

> Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. 9 Cal Rptr at 611-612.

In the present cases, all of the conduct ascribed to each Appellant was clearly incident to one objective. There was no evidence that either Mr. Brintley or Ms. Alexander possessed the respective firearm at any time other than the time of the respective underlying offense or for any purpose other than the commission of that offense. When found guilty of the underlying felony, each Appellant was also necessarily found to be in possession of a firearm in the commission of a felony. Neither Mr. Brintley's nor Ms. Alexander's conduct, therefore, was a "divisible transaction," and neither may be convicted and punished for more than one offense. If the Blockburger test, as articulated by this Court, is unable to account for this unity of purpose, then the test does not adequately serve the constitutional rights guaranteed by the Double Jeopardy Clause, and it should, therefore, be modified or replaced.

CONCLUSION

For all the reasons stated above, this Court should

grant plenary consideration of these cases.

Respectfully submitted,

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Dated: October 11, 1979

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5506

ORIGINAL COPY

CURTIS BRINTLEY,
Appellant,

v

STATE OF MICHIGAN,
Appellee,

AND

ANNETTE GAIL ALEXANDER (REAL PARTY IN INTEREST)
Appellant,

v

STATE OF MICHIGAN,
Appellee,

(In re Wayne County Prosecutor v Recorder's Court Judge)

MOTION TO AFFIRM dismissal
(AS TO BRINTLEY V MICHIGAN)
AND TO DISMISS
(AS TO ALEXANDER V MICHIGAN)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-

CURTIS BRINTLEY,

Appellant,

v

STATE OF MICHIGAN,

Appellee,

AND

ANNETTE GAIL ALEXANDER (REAL PARTY IN INTEREST)

Appellant,

v

STATE OF MICHIGAN,

Appellee,

(In re Wayne County Prosecutor v Recorder's Court Judge)

MOTION TO AFFIRM
(AS TO BRINTLEY V MICHIGAN)
AND TO DISMISS
(AS TO ALEXANDER V MICHIGAN)

NOW COME WILLIAM L. CAHALAN, Prosecuting Attorney for Wayne County, EDWARD REILLY WILSON, Chief Appellate Attorney, and TIMOTHY A. BAUGHMAN, Assistant Prosecuting Attorney, and pursuant to Rule 16 moves to affirm Brintley v Michigan, and pursuant to Rule 16(a) to dismiss Alexander v Michigan, and as reasons say:

1. The issues are indeed substantial. This Court has granted certiorari in two cases presenting a similar double jeopardy issue. Busic v United States, No. 786020, and LaRocca v United States, No. 786029, cert granted on June 4, 1979.

2. Appellee submits that this Court should affirmin Brintley v Michigan because the Michigan Supreme Court correctly resolved the question:

A) THE DOUBLE JEOPARDY CLAUSE IS NOT A SUBSTANTIVE RESTRICTION ON THE POWER OF THE LEGISLATURE TO DEFINE CRIME AND ORDAIN PUNISHMENT

". . .(T)he power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment." United States v Wiltberger, 5 Wheat 76, 95, 5 L Ed 37, 42 (1820). As stated in Brown v Ohio, supra, the double jeopardy clause:

> . . . serves principally as a restraint on courts and prosecutors. The legislature remains free under the double jeopardy clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.
> 53 L Ed 2d at 193-194.

Where the issue is substantive double jeopardy, that is, cumulative punishment arising from one prosecution, rather than procedural double jeopardy, that is, the question of successive prosecutions, ". . . the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense." Brown v Ohio, supra at 194 (emphasis added).[1/] The proposition is also made plain in Comment: Twice in Jeopardy, 75 Yale L J 262 (1965). The comment flatly states that multiple punishment is not a limitation on the legislature; indeed, that it "would be absurd as a substantive limitation on the legislature." In a section entitled "Legislative Intent Determines the Number of Convictable Offenses" the comment says:

> When the legislature clearly indicates in a statute its intent with respect to the cumulation of convictions, the court's task of construction is at an end. And if legislative intent, though not proclaimed in the statute, is nonetheless perfectly clear from legialative history, the legislature's purpose should be honored. But in the vast majority of cases, unequivocal legislative intent

---

1/ Brown v Ohio, 53 L Ed 2d at 195, fn 6, demonstrates that though double jeopardy may prevent a successive prosecution in certain circumstances, it would not necessarily prevent cumulative punishment at one trial under the same circumstances. Note also Ennis v State, 23 Cr L Rptr 2521 (Fla Ct App, 8-2-78), where the court held that Brown v Ohio and Harris v Oklahoma, 432 US 682; 97 S Ct 2919; 53 L Ed 2d 1054 (1978) were not inconsistent with conviction and punishment at one trial for both felony-murder and robbery, though under Florida law it is necessary to prove the underlying felony to prove felony-murder, the court being of the view that Brown and Harris do not control cumulative punishment cases.

> cannot honestly be found in the statute or its official history. Thus the court must ordinarily resort to presumptions about legislative intent—cannons of construction—to determine the unit of conviction created by a statute (emphasis added).[2/]

Appellant states that in relying on legislative intent the Michigan Supreme Court failed to complete the analysis, for legislative intent should be looked to in avoidance of the inquiry, not to end it. If multiple punishment was not intended, the inquiry ends, Simpson v United States, ___ US ___; 55 L Ed 2d 70 (1977); but if it was, then the analysis proceeds. Appellee submits that the analysis is actually three-fold. If multiple punishment was not intended, the inquiry ends. If it was, the inquiry ends. If it is unclear, then "the court must ordinarily result to presumptions about legislative intent—canons of construction—to determine the unit of conviction created by a statute." Comment: Twice in Jeopardy, supra. Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L J 513, 516 (1949) states it thusly:

> In the overwhelming number of cases, however, no clear legislative intent exists. The task of ascertaining whether one or several offense schemes should apply then becomes a judicial one which the courts constantly perform behind the veil of procedural tests (emphasis added).

Even Chief Justice Warren, dissenting in Gore, supra, recognized that "In every instance the problem is to ascertain what the legislature intended." The Chief Justice was not speaking merely in avoidance of the analysis if the legislature did not intend multiple punishment; plainly from his opinion he would have also considered the matter closed had he found that the legislature did intend to cumulate punishment.

Appellee would summarize his position by quoting from 65 Yale L J 339, 363-364:

2/ That the test in Blockburger is a "canon of construction" for use when legislative intent is unclear is made plain in Iannellu v United States, 420 US 770, 784 (fn 17); 95 S Ct 1284; 43 L Ed 2d 616 (1975), where Blockburger is analogized to Wharton's Rule: "The test articulated in Blockburger v United States . . . serves a generally similar function (to Wharton's Rule) of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction."

> The primary substantive problem is one of legislative intent, not legislative power, for the legislature can award as many different penalties as it deems desirable for a given act or transaction, or any aspect of an act or transaction, as long as the statute accords substantive due process of law and avoids the eighth amendment prohibition of cruel and unusual punishments. This authority is inherent in the power to make conduct criminal and to penalize it and is not limited in any meaningful sense by the concept of double jeopardy (emphasis added).

The Michigan legislature intended cumulative punishment for felony-firearm and the felony. It has the power to so provide. The judicial inquiry should be ended upon that recognition.

B) CONVICTION AND PUNISHMENT FOR FELONY-FIREARM AND THE FELONY IS PERMISSIBLE UNDER BLOCKBURGER

Even assuming that substantive double jeopardy acts as a check on legislative authority and that the clear legislative intent to create separate crimes and separate punishment does not control the inquiry, then appellee would argue that Blockburger, supra, supports both convictions

The leading case in this area of double jeopardy is Blockburger v United States, 284 US 229 (1931) where the defendant was charged with five counts of violating the federal narcotics law. Defendant was convicted on three counts and given a five-year sentence and $2,000 fine on each, the terms to run consecutively. One count on which defendant was convicted charged a sale of narcotics not in or from the original stamped package; another count on which defendant was convicted charged the same sale of the same narcotics as having not been made pursuant to a written order of official form by the purchaser. The Court stated the issue succinctly:

> Here there was but one sale, and the question is whether, both sections being violated by the same act, the accused committed two offenses or only one. 284 US at 304.

In answering that two offenses were committed by the defendant's single act, the Court noted:

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other... Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed (Emphasis added). 284 US at 304.

The principle announced in Blockburger was followed and reaffirmed in Gore v United States, 357 US 386 (1958). In considering the continued vitality of Blockburger in the double jeopardy area, Justice Frankfurter wrote:

> Finally, we have pressed upon us that the Blockburger doctrine offends the constitutional prohibition against double jeopardy. If there is anything to this claim it surely has long been disregarded in decisions of this Court, participated in by judges especially sensitive to the application of the historic safeguard of double jeopardy. 357 US 392.

The test announced in Blockburger and reaffirmed explicitly in Gore has been analyzed and employed on numerous occasions by numerous courts. See, e.g., Simpson v United States, 55 L Ed 2d 70 (1978); Brown v Ohio, 432 US 161 (1977); Jeffers v United States, 432 US 137 (1977); Iannelli v United States, 420 US 770 (1975)[3/]; United States v Wright, ___ F 2d ___, 23 Cr L R 2521 (8th Cir 1978); Kowalski v Parratt, 533 F2d 1071 (8th Cir 1976), cert den 429 US 844 (1976). As the Supreme Court of Nebraska noted in State v Saxon, 193 Neb 278, 226 NW 2d 765 (1975), where the defendant was convicted of robbery and the use of a firearm in the commission of a felony:

> It is well settled that the test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the offenses than is necessary to prove one of the other offenses. 226 NW 2d at 767 (Emphasis added).

In Kowalski v Parratt, supra the meaning of the Blockburger test was even more particularly described. When construing the same Nebraska statutes involved in State v Saxon, supra, the Kowalski court made the following observations:

3/ Fn 17, 420 US at 784 makes it clear that Blockburger is to be applied factually rather than abstractly: "As Blockburger and other decisions applying its principle reveal . . . the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." (Emphasis added)

> Although the appellant assumes that Count II required proof of the robbery alleged in Count I, that is not the case. The weapons statute is satisfied by proof that a weapon was possessed or used during any felony. Count II simply alleged that the firearm was used 'in the commission of the crime set forth in Count I.'
>
> Thus the district court is clearly correct that in the abstract these statutes define two distinct crimes. However, petitioner asserts that double jeopardy claims should be assessed in light of the particular facts of each case. Here it is undisputed that petitioner used a firearm to create the fear necessary to carry out the robbery. Thus, petitioner argues, to prove the elements of this particular robbery the state also was "required" to prove all of the elements of the Count II offense. This is not a novel reading of Blockburger. In the case of Michener v United States, 157 F 2d 616 (8th Cir 1946), this court adopted just that view . . . .
>
> The court therefore proceeded to examine the facts of the case and concluded that under the circumstances proof of Count I also established Count II. On this basis, the court found that the sentences violated the Double Jeopardy Clause.
>
> The Supreme Court, however, granted certiorari and reversed . . . . The one paragraph per curiam opinion gave no reasoning but simply cited Blockburger and Albrecht as controlling precedents. . . .
>
> Based on these and other cases the federal courts now recognize that "in order to support a claim of double jeopardy it must be shown that the offenses charged were in law and fact the same offense." 533 F2d at 1073-1074.

In conclusion, the Court of Appeals for the Eighth Circuit noted:

> We have already observed that the two statutes at issue here have different elements as a matter of law, although a common element as a matter of fact. Different policies come into play when a criminal uses or possesses certain deadly weapons during a crime than when he relies upon mere threats, his bare hands, or upon other less dangerous devices. Since the two crimes at issue do not in law constitute the same offense, double jeopardy is inapplicable. 533 F2d at 1074.

Thus, the Michigan Supreme Court correctly decided the issue.

3. Alexander v Michigan should be dismissed under Rule 16(a). The prosecution filed what is called in Michigan a complaint for superintending control to the Michigan Court of Appeals to force the trial judge to sentence as required by the statute. The Michigan Supreme Court has now decided only that the trial judge erred in refusing to sentence. Whether the conviction itself will be affirmed remains to be seen, as defendant's appeal is presently pending in the Michigan Court of Appeals. The appeal is thus not from a final judgment: Market St. Ry Co. v Railroad Commission of State of Cal., 324 US 548 (1945); Costarelli v Massachusetts, 421 US 193 (1975).

RELIEF

WHEREFORE, appellee, the State of Michigan, requests that Alexander v Michigan be dismissed, and that Brintley v Michigan be affirmed or probable jurisdiction noted.

Respectfully submitted,

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Dated: October 17, 1979.

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IN THE

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OCTOBER TERM 1979

No. 79-5506

CURTIS BRINTLEY,

Appellant,

-vs-

STATE OF MICHIGAN,

Appellee.

ORIGINAL COPY

IN THE MATTER OF PEOPLE OF THE STATE OF MICHIGAN v ANNETTE GAIL ALEXANDER, Appellant, (In re Wayne County Prosecutor v Recorder's Court Judge)

Petitioner's Reply Brief

BRIEF IN OPPOSITION TO MOTION TO DISMISS (re ALEXANDER)

WHERE AN APPEAL ARISES FROM A PROCEEDING DISTINCT FROM APPELLANT'S TRIAL LITIGATION, WHICH PROCEEDING CHALLENGED THE TRIAL COURT'S AUTHORIZATION TO REFUSE TO SENTENCE APPELLANT, ESTABLISHED THE RECORD OF THE CONSTITUTIONAL ISSUE RAISED IN THIS APPEAL, AND HAS BEEN TERMINATED IN THE STATE COURT, WHERE THE ISSUES LITIGATED IN THE PROCEEDING WERE NARROWER THAN THOSE RAISED AT TRIAL, AND WHERE BOTH THE PLAINTIFF AND NAMED DEFENDANT IN THE PROCEEDING ARE OTHER THAN THE NAMED PARTIES TO THE TRIAL COURT ACTION, IS NOT THE FINAL JUDGMENT OF THE HIGHEST STATE COURT AS TO THIS PROCEEDING REVIEWABLE BY THIS COURT?

STATEMENT OF FACTS

The facts underlying this appeal are set out in Appellant's Jurisdictional Statement.

After the trial judge merged Appellant's sentence as

to Count II (possession of a firearm during the commission of a felony) with her sentence as to Count I (second degree murder), the Wayne County Prosecutor initiated an original action in the Michigan Court of Appeals, naming the trial judge as defendant and challenging his authorization to refuse separately to sentence on Count II. [Appellant had the status of a party to this action in that court and in the Supreme Court of Michigan as well.] The sole issue considered by that court was the constitutionality of MCLA 750.227b (possession of a firearm during the commission of a felony) as relevant to the trial judge's authority to act as he did. No other question was considered in that court or in the Supreme Court of Michigan in this proceeding. The judgment of the latter court is not reviewable by any other Michigan state court, nor may Appellant raise the issue litigated in this proceeding in her pending state court appeal of her convictions.

The separate proceeding initiated by the Wayne County Prosecutor established virtually the entire record of the constitutional issue presented in this appeal.

ARGUMENT

As part of this Court's jurisdiction to review the final judgments of the highest court of a state in which a decision can be had, 28 USC §1257, it has determined that the test for finality "is not whether under local rules of practice the judgment is denominated final...but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." Department of Banking v Pink, 317 US 264, 268 (1942).

Where an appeal in this Court is in some way related to other pending litigation, a critical factor in determining the finality of the judgment below is whether the proceeding in this Court is, in fact, distinct from the other pending proceeding.

In Costarelli v Massachusetts, 421 US 193 (1975), where appellant had been convicted in the first tier of Massachusetts' two-tier system, this Court discussed certian criteria for determination of whether a proceeding is distinct for review purposes. After lodging an appeal to the second tier, Costarelli appealed to this Court, challenging the non-jury nature of the first proceeding. Dismissing his appeal for want of jurisdiction, this Court noted several respects in which distinctness was there lacking: The proceeding in the second tier would be based on precisely the same complaint brought in the first trial; it would involve broad de novo litigation of all aspects of the case; and it would not be a distinct lawsuit.

In Fisher v District Court, 424 US 382 (1976), involving a Montana writ of supervisory control comparable to the Michigan order of superintending control involved herein, this Court rejected a claim virtually identical with Appellee's here:

> The writ of supervisory control issued by the Montana Supreme Court is a final judgment within our jurisdiction under 28 USC §1257(3). It is available only in original proceedings in the Montana Supreme Court, Mont Const, Art VII, §§2(1), (2); Mont Rule App Civ Proc 17(a), and although it may issue in a broad range of circumstances, it is not equivalent to an appeal. See Mont Rule App Civ Proc 17(a); State ex rel. Amsterdam Lumber, Inc v District Court, 163 Mont 182, 186-187, 516 P2d 378, 380-381 (1973); Walker v Tschache, 162 Mont 213, 215-217, 510 P2d 9, 10-13 (1973). A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court. 424 US at 385, n7 (emphasis added)

See also Rescue Army v Municipal Court, 331 US 549, 565-568 (1947); New York ex rel Bryant v Zimmerman, 278 US 63, 70 (1928); Largent v Texas, 318 US 421, 422 (1943); Bandini Petroleum Co v Superior Court, 284 US 4 (1931). Contrast: Gospel Army v City of Los Angeles, 331 US 543 (1947).

As in Fisher, and as distinguished from Costarelli, the instant appeal arises from an action independent from the remaining proceedings below. The complaint for superintending control filed by the Wayne County Prosecutor in the Michigan Court of Appeals was an original proceeding, defined by Michigan General Court Rules [hereinafter GCR] 711.1 at p. 157 (West 1978), as "enforc[ing] the superintending control power of a court over lower courts or tribunals.* It is not a substitute for an appeal.

---

* GCR 711 provides:

> .1 Scope. A superintending control order enforces the superintending control power of a court over lower courts or tribunals.
>
> .2 Policy Concerning Use. If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed. See GCR 1963, 701.1(b); 711.4(b); 862.5(a).
>
> .3 Writs Superseded. A superintending control order replaces the writs of certiorari and prohibition and the writ of mandamus when directed to a lower court or tribunal.
>
> .4 Jurisdiction.
>
> (a) The Supreme Court, the Court of Appeals, and the circuit court have jurisdiction to issue superintending control orders to lower courts and tribunals.
>
> (b) When an appeal in the Supreme Court, the Court of Appeals, or the circuit court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.
>
> .5 Procedure for Superintending Control in Circuit Court.
>
> (a) Complaint. A party seeking superintending control in the circuit court must file a complaint with the court. Only the plaintiff's name may appear in the case title (for example, In re Smith). The plaintiff must serve a copy of the complaint on the court or tribunal over which superintending control is sought and any other party to the proceeding in that court.
>
> (b) Answer. Anyone required to be served under paragraph (a) may file an answer within 20 days after the complaint is served.

(continued on next page)

In his complaint, the prosecutor alleged that the trial judge was without legal authorization to refuse to sentence Appellant for violation of MCLA 750.227b. The named parties to this proceeding (Wayne County Prosecutor v Recorder's Court Judge) are not the parties (People of the State of Michigan v Annette Gail Alexander) to the other proceeding below. The superintending control action was narrowly confined to considering the constitutionality of MCLA 750.227b and was not a broad relitigation of all or any other aspects of the trial court proceeding. It has also precluded Ms. Alexander from litigating this issue anew in state court. Finally, this action and its subsequent appeal to the state supreme court established virtually the only record by which this Court can consider the constitutional question raised in this appeal.

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* continued from previous page

> (c) Issuance of Order; Dismissal.
>
> (1) After the filing of a complaint and answer or, if no answer is filed, after expiration of the time for filing an answer, a circuit judge may issue an order to show cause why the order requested should not be issued, may issue the order requested, or may dismiss the complaint.
>
> (2) If a need for immediate action is shown, a judge may enter an order before an answer is filed.
>
> (3) The court may require in the order to show cause that additional records and papers be filed.
>
> (4) An order to show cause must specify a date for hearing the complaint.

For all these reasons, the judgment below is presently reviewable by this Court. The motion to dismiss should, therefore, be denied.

Respectfully submitted,

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Dated: November 1, 1979